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No. 04-10566

IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

THE STATE OF OREGON

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) AND THE LAW COUNCIL OF AUSTRALIA (LCA) AS *AMICI CURIAE* IN SUPPORT OF PETITIONER MOISES SANCHEZ-LLAMAS

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International Cases and Materials

Avena and Other Mexican Nationals, (Mex. v. U.S.), 2004 I.C.J. 128 (March 31, 2004)..... passim

Factory at Chorzów, 1927 P.C.I.J. (ser. A) no. 9 4

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Duke v The Queen (1989) 180 CLR 508 18

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McDermott v. The King (1948) 76 CLR 501 18

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Tan Seng Kiah v R.. [2000] 10 NTLR 128 (N. Terr. Ct. Crim. App.) (Austl.) 19

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Israel, Kamisar & LaFave, CRIMINAL PROCEDURE AND THE CONSTITUTION 311 (2004) 9, 10

Internal Revenue Manual (2004), part 9.4.12.9 21

John Quigley, *Suppressing the Incriminating Statements of Foreigners,* 13 WM. & MARY BILL RTS. J. 339 (2004). 14

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THE GILBERT AND TOBIN CENTRE OF PUBLIC LAW, *Submission made to Parliamentary Joint Committee on ASIO, ASIS and DSD on Questioning and Detention Powers* (March 24, 2005) 18

Valencia et al., *Avena and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas's Independence From the World*, 23 YALE L. & POL'Y REV. 455 (2005) 15

INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation whose membership of more than 11,000 regular members and 25,000 affiliate members include lawyers from every state. NACDL is the only national bar organization working exclusively on behalf of public and private criminal defense lawyers and their clients. The American Bar Association recognizes the NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL members are in daily contact with the criminal justice system, representing individuals in both state and federal courts. NACDL works domestically and internationally to ensure justice and due process for persons accused of crime; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice.

Representing some 40,000 legal practitioners across the country, the mission of the Law Council of Australia (LCA) includes representing the legal profession at the national level and promoting the administration of justice, access to justice and general improvement of the law. The LCA advises governments and courts on ways in which the law and the justice system can be improved for the benefit of the community. It is a member of several international legal organizations, including the International Bar Association (IBA) and the Commonwealth Lawyers Association (CLA).

SUMMARY OF ARGUMENT

The private and justiciable rights under Article 36 to the Vienna Convention on Consular Relations (VCCR) compel

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[1] Counsel for all parties have consented in writing to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the amici, has made a monetary contribution to the preparation of this brief.

the recognition and enforcement of appropriate remedies. Federal statutes, like treaties, are often silent with regard to remedies. Nevertheless, the absence of specific remedial language in a treaty or statute has never deterred this Court from providing appropriate remedies for violations of individual rights. Indeed, United States courts have suppressed evidence as a remedy for a wide variety of both constitutional and statutory violations, particularly when the violation has the potential to impair the integrity of the justice system.

Compliance with Article 36 provides critical protections for detained foreign nationals who are disoriented, confused and isolated in an unfamiliar legal system. Consular notification allows foreign nationals to access a vital support system that enables them to become full participants in the criminal process. Foreign defendants can participate in their own defense only when they are fully informed of their rights, are provided with competent interpreters, and are able to communicate effectively with attorneys and court personnel. Yet when foreign nationals are deprived of their rights to consular notification and access, these essential attributes of the fair administration of justice are undermined. For this reason, suppression is an entirely appropriate remedy for Article 36 violations.

But suppression of incriminating statements is an appropriate remedy for another reason, as well. The availability of suppression as a remedy for Article 36 violations will simultaneously increase compliance with the treaty's provisions on consular notification and access and deter law enforcement officers from ignoring their obligations under the treaty. Allowing for the discretionary suppression of statements thus promotes good police practices which, in turn, advance the integrity of criminal proceedings.

For these very reasons, other common law jurisdictions

have recognized that suppression of statements is an appropriate remedy for Article 36 violations. In at least three cases, Australian courts have applied suppression or exclusion as the remedy for breaches of consular communication rights. Courts in the United Kingdom have likewise concluded that the failure to inform detained foreigners of their consular rights warrants the discretionary remedy of exclusion.

ARGUMENT

I. Individual Treaty Rights Compel the Recognition and Enforcement of Appropriate Remedies

There is ample and uncontrovertable evidence that detained foreign nationals have individual rights under Article 36 of the Vienna Convention on Consular Relations.[2] Given the existence of those rights, United States courts must be empowered to provide adequate remedies for their violation.[3]

It is neither surprising nor significant that the VCCR does not define a remedy for a breach of its provisions, for it is commonplace for "substantive rights [to] be defined by [treaty] but the remedies for their enforcement left undefined

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[2] Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 34 U.N.T.S. 262.

[3] Other briefs submitted to this Court explain in detail why Article 36 must rightfully be construed as conferring individual rights, a position that the *amici* fully support. *See, e.g.*, Brief for Petitioner, *Bustillo v. Johnson* (No. 05-551); Brief for Petitioner, *Sanchez Llamas v. Oregon* (No. 04-10566); Brief Amicus Curiae of the Association of the Bar of the City of New York in Support of Petitioners.

or relegated wholly to the states."[4] This Court has recognized as much. In construing self-executing treaties that confer rights on foreign nationals, the Court has neither sought nor required specific remedial language before fashioning appropriate remedies for violations of those treaty-based rights. *See, e.g., Kolovrat v. Oregon*, 366 U. S. 187 (1961); *Asakura v. Seattle*, 265 U. S. 332 (1924); *Hauenstein v. Lynham*, 100 U.S. 483 (1879).[5]

Under international law, the recognized remedy for a treaty violation is to restore the *status quo ante* by "wip[ing] out all the consequences of the illegal act and reestablish[ing] the situation which would, in all probability, have existed if that act had not been committed." RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 901 (1987). *See also* IAN BROWNLIE, STATE RESPONSIBILITY 210 (1983) (nullity is the necessary outcome of illegality in international law). The United States has acknowledged this international law of remedies as a customary rule. Memorial of the United States, *Tehran Hostages Case*, 1980 I.C.J. Pleadings at 188 ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an

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[4] Carlos Manuel Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1144 (1992) (quoting Hart & Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 533 (1988). *See also Factory at Chorzow*, 1927 P.C.I.J. (ser. A) no. 9, at 21.

[5] Significantly, none of the treaties addressed in these cases specified a particular remedy for the breach of their rights-conferring provisions. *See also Medellin v. Dretke*, 125 S.Ct. 2088, 2104 (2005)(O'Connor, Stevens, Souter, Breyer, JJ., dissenting) (language of other treaties found to confer individual rights on foreign nationals "is arguably no clearer than the Vienna Convention's is, and they do not specify judicial enforcement."). *See also Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994) (invalidation of an immigration proceeding for a breach of consular notification is an available remedy "upon a showing of prejudice to the rights sought to be protected by the subject regulation.").

adequate form.") (quoting *Factory at Chorzów*, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21); *cf. Avena and Other Mexican Nationals, (Mex. v. U.S.)*, 2004 I.C.J. 128 (March 31, 2004), ¶ 119 ("*Avena*") (remedy for a treaty violation is reparation in adequate form "that corresponds to the injury"). This principle is in no way controversial, for as the U.S. argued in *Tehran Hostages* "Reparation . . . is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the [Vienna] Convention itself." *Id.*

Acting in conformity with these long established principles, the International Court of Justice (ICJ) recently held that the United States was required to provide a judicial remedy for Article 36 violations in the cases of Mexican nationals facing severe penalties or prolonged incarceration. *Avena* ¶ 153(11) (United States must allow review and reconsideration of affected nationals' convictions and sentences "so as to allow full weight to be given to the violation of the rights set forth in the convention"). In doing so, the ICJ called upon the United States courts to determine whether the remedy of suppression would be appropriate under the concrete circumstances of each case in which the authorities had violated their obligations under Article 36, and the defendant was sentenced to a severe penalty or prolonged incarceration. *Avena* ¶ 127.

II. Suppression is a Time-Honored Remedy for Violations of Procedural Rights Essential to the Fair Administration of Justice

Suppression as a remedy has been provided for a wide variety of both constitutional and statutory violations. Federal statutes, like treaties, are often silent with regard to remedies that flow from their violation. Nevertheless, courts have not hesitated to impose sanctions for statutory

violations in appropriate cases.[6]

A. Suppression Has Long Been Required for Willful Violations of Non-Constitutional Procedural Rules

In *McNabb v. U.S.*, 318 U.S. 332, 345 (1943), this Court overturned a conviction where a statement was taken in violation of a procedural rule requiring prompt appearance before a magistrate, reasoning that the convictions could "not be allowed to stand without making the courts themselves accomplices in willful disobedience of law." In doing so, this Court explicitly expanded the remedy of suppression beyond those situations protecting a right "derived solely from the Constitution." *Id.*, at 341; *see also Upshaw v. United States*, 335 U.S. 410, 413 (1948). *Upshaw*, like *McNabb*, involved deliberate police misconduct in flouting a procedural rule. 335 U.S. at 414. In both instances, suppression was deemed necessary because the courts would be tainted by the police misconduct if the statements were admitted.

The rule adopted in *McNabb* was clarified in *Mallory v. United States*, 354 U.S. 449 (1957). *Mallory* found a confession to be inadmissible when obtained in violation of Federal Rule of Criminal Procedure 5(a), which mandated that the defendant be brought before a committing magistrate "without unnecessary delay." The Court stressed the role of

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[6] *See, e.g., United States v. Doe*, 170 F.3d 1162, 1168 (9th Cir. 1999) (suppression may be warranted where violation of Juvenile Protection Act not harmless beyond a reasonable doubt); *United States v. Marts*, 986 F.2d 1216, 1218-19 (8th Cir. 1993) (exclusionary rule applies to statutory knock and announce rule); *United States v. Rivieccio*, 919 F.2d 812, 816 (2d Cir. 1990) (suppression appropriate remedy for misuse of immunized testimony); *United States v. Chemaly*, 741 F.2d 1346, 1353-54 & n.2 (11th Cir. 1984) (suppression appropriate where warrant statute violated); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 893 n.2 (9th Cir. 2000) (Thomas, J., dissenting) (collecting cases where suppression provided for non-constitutional violations).

timely warnings and the intervention of a third party designed to safeguard an unknowledgeable and susceptible defendant from overzealous police. 354 U.S. at 455. The resulting *McNabb-Mallory* rule was used to suppress voluntary statements because to do otherwise would undermine confidence in the fair administration of justice. 354 U.S. at 456. [7]

B. Suppression is Available for Prejudicial Violations of Statutory Rights That Provide Access to Meaningful Support and Counsel

Individual rights under the VCCR are on par with rights created by federal statute. *Breard v. Greene*, 523 U.S. 371, 376 (1998), quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality). In addressing violations of the statutory right to parental notification under the Juvenile Delinquency Act (JDA),[8] some lower courts have applied reasoning that is strikingly reminiscent of the concerns that animated the drafters of Article 36 to enshrine the rights to consular notification and access. *See, e.g. United States v. Doe*, 701 F.2d 819, 822 (9th Cir. 1983) (requiring consular notification to protect the rights of unaccompanied foreign juveniles); *see also Doe II*, 862 F.2d 776, 780-81 (9th Cir. 1988). While the Ninth Circuit has not automatically suppressed statements taken in violation of the JDA, it has held that suppression may be warranted where the violation is not harmless beyond a reasonable doubt. *Doe IV*, 170 F.3d 1162, 1168 (9th Cir. 1999).

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[7] Congress altered this rule through the Omnibus Crime Control and Safe Streets Act of 1968 to deny suppression solely on the grounds of unreasonable delay, dispute among courts still exists as to the extent that delay may be used to suppress a statement. *See United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994).

[8] 18 U.S.C. 5033. Section 5033 states that "the arresting officer . . . shall immediately notify . . . the juvenile's parents, guardian, or custodian of such custody."

The Ninth Circuit's assessment of harm in these cases is closely linked to its assessment that juveniles are an inherently vulnerable class of defendants. This Court has likewise recognized the crucial importance of "counsel and support" during interrogation for particularly vulnerable individuals, such as juveniles, who are more likely "to become the victim[s] first of fear, then of panic." *Haley v. Ohio*, 332 U.S. 596, 600 (1948). Detained foreign nationals are similarly susceptible to fear and manipulation, both of which are compounded by the language barriers they often face. As one commentator has observed, language, culture and separation from family

> creates an aura of chaos surrounding a detained or arrested foreign national, and inevitably leads to diminished protection of rights critical from arrest onwards. Article 36 of the Convention protects against these problems by allowing detained foreign nationals to contact and confer with a member of their state's consulate.

Linda A. Malone, *From Breard to Atkins to Malvo: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty* (hereafter MALONE), 13 WM. & MARY BILL RTS. J. 363, 392-93 (2004).

Due to the inherent vulnerability of detained foreign juveniles, and their "exacerbated sense of isolation and helplessness" the Ninth Circuit has held that officers must "delay interrogation of the juvenile for a reasonable time to allow consular notification and response." *United States v. Juvenile (RRA-A)*, 229 F.3d 737, 746 (9th Cir. 2000) (Suppression warranted for failure to contact consulate before questioning). Notably, the JDA specifies no remedies for its breach. Like the equivalent notification obligation under Article 36, the cure for non-compliance with the JDA stems from a basic recognition that "access to meaningful support and counsel" are the touchstone of any adequate

advisement of rights. *Juvenile RRA-A*, 229 F.3d at 746; *see also Marbury v. Madison*, 5 U.S. 137, 163 (1803) (U.S. law must furnish a remedy for the violation of a vested legal right).

C. Suppression Has Been the Historical Remedy for Statements of Questionable Reliability

The Fifth Amendment privilege against compulsory self-incrimination existed for more than one hundred years before it served as a basis for suppression of an incriminatory statement in federal court proceedings in *Bram v. U.S.*, 168 U.S. 532 (1897). Approximately seventy years later, in *Miranda v. Arizona*, 384 U.S. 436 (1966), this constitutional provision served as the basis for the Court's historic ruling regarding the suppression of statements in state criminal proceedings.

But even before *Bram* and *Miranda*, suppression of statements was the preferred remedy in the United States and Britain to protect defendants from convictions based upon unreliable confessions secured through improper means. *See, e.g.*, Israel, Kamisar & LaFave, CRIMINAL PROCEDURE AND THE CONSTITUTION 311 (2004). While suppression analyses were often couched in terms of "voluntariness," courts have long been more concerned with the trustworthiness or reliability of statements obtained by the police. *See Bram*, 168 U.S. at 543 (*quoting* 3 Russ. Crimes (6th Ed.) 478) (reliability of a confession can be affected by "any sorts of threats or . . . any direct or implied promises, however slight").

In 1936, this Court for the first time invoked the Fourteenth Amendment's due process clause to condemn coercive interrogation practices by the States. *See Brown v. Mississippi*, 297 U.S. 278 (1936). Noting that interrogation is a fundamental component of the process through which a state secures a criminal conviction, the *Brown* Court applied

a federal due process analysis to state criminal prosecutions. The conduct of interrogations by state law enforcement officers thereby became subject to analysis and potential invalidation under the Fourteenth Amendment.

Voluntariness continued to be the lens through which interrogations were inspected, despite the sharp drop in physically abusive interrogations following *Brown*. By 1960, this Court acknowledged that the "voluntariness" analysis was really a shorthand way of invalidating confessions that were obtained in a manner which offended a "complex of values." *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960). This "complex of values" required suppression of statements that were either (1) untrustworthy, (2) obtained by offensive police practices, or (3) obtained under circumstances in which the defendant's free choice was significantly impaired.[9] *See* LAFAVE ET. AL., CRIMINAL PROCEDURE §6.2(b) (4th ed. 2000).

A totality of the circumstances test was adopted to assess this more complex notion of voluntariness, requiring the courts to carefully assess the actions of police during interrogations.[10] However, as it has in other contexts, the totality of the circumstances test has often proven imprecise and incapable of uniform application. Due to this imprecision, courts and other actors in the criminal justice system sought out clearer rules for suppression that would deter police misconduct while decreasing the problem of unreliable confessions.

D. Strict Adherence to Warnings and Adequate Advisement of Rights are Essential to Ensure the

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[9] This third goal was effectively undermined if not eliminated by the Court fifty years after *Brown* in *Colorado v. Connelly*, 479 U.S. 157 (1986) (invalidated suppression as a remedy in the absence of police misconduct).

[10] *See Haynes v. Washington*, 373 U.S. 503 (1963).

Reliability of Statements and Police Respect for Binding Legal Obligations

Miranda changed the law significantly, but not the underlying rationale for suppression. First, it articulated a Fifth Amendment right to counsel, whose purpose was to ensure that the defendant was not kept in isolation and subjected to coercive tactics. 384 U.S. at 448-49, 465. The second significant change adopted by *Miranda* was that henceforth police officers would be required to warn a criminal defendant of the constitutional rights to remain silent, to have an attorney appointed if the defendant could not afford one, and to have an attorney present during questioning. *Id.* at 473-74. If a statement is taken outside the presence of an attorney, a "heavy burden" falls upon the prosecution to prove that the rights to be free from self-incrimination and the right to counsel were knowingly and intelligently waived. *Id.* a 475. This heavy burden creates a presumption in favor of suppression when statements are taken without warnings and waivers. *Id.*

Miranda tied the required warnings and the presumption in favor of suppression very strongly together. Statements obtained during custodial interrogation in violation of the dictates of *Miranda* are presumed involuntary and will be suppressed. Following *Miranda*, suppression has been tied more strongly to a violation of the warnings than it is to the underlying right.

> No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

Id. at 471-72. In so articulating these rights, the Court held that suppression is warranted for a violation of the warning, even if the defendant was actually aware of his underlying

rights. With this decision, this Court embraced a rule that clarified the rights and obligations of defendants and law enforcement personnel alike. Through their adoption of this rule, the Court sought to establish an identifiable mechanism for determining whether police misconduct had occurred, as well as a means for curbing that misconduct. *Id.* at 448-49. In addition, the Court hoped to marshal an aid in determining whether a defendant's statement was voluntary and reliable. *Id.* at 463, n. 33.

III. Non-Compliance With Article 36 Undermines the Integrity of Criminal Proceedings

The *Miranda* decision and its progeny have in no way eliminated the underlying purposes of suppression. Suppression still serves the purposes of curbing police misconduct during interrogations and ensuring that only reliable statements are admitted into evidence. These purposes are equally served by suppressing statements taken by law enforcement officers who have failed to notify a defendant of his Article 36 rights "without delay."

Foreign nationals are particularly susceptible to coercive interrogation tactics. Many, if not most foreign nationals, like Mr. Sanchez-Llamas, confront linguistic and cultural barriers that not only impede their understanding of their rights under a foreign system of law, but can lead to false confessions. *See* Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner ("Mexico Amicus") at 12. It is the

> obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer--to the

> untrained layman--may appear intricate, complex, and mysterious.

Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938). To a detained foreign national, the myriad rules that govern the prosecution of serious criminal cases are not merely complex and mysterious – they are unfathomable. As other *amici* have noted, foreign criminal justice systems differ fundamentally from one another, both in their formal rules and in their practical operation. *See* Mexico Amicus at 10-11. For example, the right to remain silent is anathema to the inquisitorial systems of justice predominant in much of the world, which rely upon evidence from the defendant to obtain convictions. *See* Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Toward an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 406-07 (1994). Negative inferences can be drawn from any attempt to remain silent in the face of official questioning about a crime. The cultural norm of cooperating with questioners is particularly strong in those countries with dominant Catholic traditions, for the inquisitorial method derives from the ecclesiastical courts. *Id.* at 410-11.

Consular notification allows the national to avail himself of the assistance of consular officials who can explain the differences between his home country and the United States, including such fundamental concepts as the right to remain silent, the notion that statements to the police can be used as evidence in a court of law, the right to appointed counsel, the role of a public defender, the nature of criminal charges and the penalty that can be imposed after a conviction, the role of plea bargaining, and the adversarial system of law. Consular officers can even provide lawyers for defendants. *See* Mexico Amicus at 12-13.

For these reasons, the Inter-American Court on Human Rights has determined that Article 36 serves to protect an

inherently vulnerable group of detainees. *See* The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999) at ¶122 (recognizing that the individual right to consular notification is "among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial"). The court observed that the provisions of Article 36 reflected a "shared understanding that the right to information on consular assistance is a means for the defense of the accused that has repercussions –sometimes decisive repercussions- on enforcement of the accused's other procedural rights." *Id.* ¶ 123.

The peculiar difficulties experienced by a foreign national accused of a crime make it exceedingly unlikely that *Miranda* warnings will suffice to protect foreign nationals' rights and preserve the integrity of our domestic courts:

> [F]oreign nationals are particularly prone to succumbing to interrogation techniques aimed at encouraging them to confess. . . Foreign nationals may have particular difficulty understanding the right to remain silent when it is explained to them by a police officer [who is interrogating them]. . . . [T]he VCCR assumes that foreign nationals may benefit from consular assistance and requires the detaining authorities to facilitate this assistance.

John Quigley, *Suppressing the Incriminating Statements of Foreigners*, 13 WM. & MARY BILL RTS. J. 339, 340-41 (2004).

Article 36 serves as a safeguard to ensure that foreign nationals have the support of individuals who can orient

them to the bewildering array of rules that govern the United States criminal justice system. The provisions of Article 36(1)(b) set forth clear and easily enforced rules that promote the integrity of the judicial process and help prevent unreliable statements by defendants who do not understand their interrogators. In short, Article 36 promotes many of the same goals as the procedural rules whose violation led the Court to suppress custodial statements in *McNabb* and *Mallory*.

Moreover, Article 36 provides foreign defendants with the right to seek the assistance of consular officers who are empowered to assist them in obtaining legal representation at a critical juncture in their criminal prosecution. In this manner, consular officers serve much the same function as parents of detained juveniles – and the authorities' failure to enforce the rights of consular notification and access should be treated in the same manner as the Ninth Circuit addressed violations of the Juvenile Protection Act in *United States v. Juvenile (RRA-A)*, 229 F.3d at 746.

IV. Suppression is Essential to Ensure Compliance with Article 36

Thirty-six years after the United States ratified the Vienna Convention, state actors still openly resist enforcing the treaty, rejecting the authority of the International Court of Justice and claiming that they cannot be held responsible for violations of Article 36. *See, e.g.*, Valencia et al., *Avena and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas's Independence From the World*, 23 YALE L. & POL'Y REV. 455, 456-57 (2005) (quoting spokesman for Texas Governor Rick Perry as stating, "Obviously the governor respects the world court's right to have an opinion, but the fact remains they have no standing and no jurisdiction in the state of Texas.") The ongoing reluctance of state law enforcement officers to comply with their obligations to enforce the treaty's

provisions argues strongly in favor of suppression. Only by providing remedies for Vienna Convention violations will courts ensure future compliance with the United States' binding treaty obligations.

A. Other Parties to the Vienna Convention Provide Judicial Remedies such as Suppression for Violations of Individual Consular Rights

The lower court in this case concluded that suppression is never available for a breach of Article 36 rights, relying largely on the State Department's assertion that "the [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *State v. Sanchez-Llamas*, 108 P.3d 573, 578 (Or. 2005) (citing *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000)). The lower court likewise relied upon the State Department's claim that "no other signatories to the Vienna Convention have permitted suppression under similar circumstances." *Sanchez-Llamas*, 108 P.3d 573, 578. Both claims are incorrect as a matter of law. As to the first, the ICJ has clearly held that the United States must provide a judicial remedy for Article 36 violations in cases involving severe penalties or prolonged incarceration. *Avena* ¶¶ 121, 122, 127, 140-41. As to the second, both the lower court and the State Department overlooked decisions from Australia and the United Kingdom in which courts have excluded incriminating statements or evidence after finding that the authorities neglected to notify foreign detainees of their consular rights.

1. Australian Courts Exclude Evidence to Remedy Violations of Individual Consular Rights

The Australian government has codified its Article 36 obligations in Part 1(C), Section 23P, of the *Crimes Act*

1914.[11] Under Section 23P, federal police must advise detained foreigners of their right to consular notification prior to any interrogation and must then notify the consulate upon request, allowing the detainee a "reasonable time" and facilities to communicate with the consulate. In addition, "an investigating official must not start to question the person" until these requirements have been met.[12] At least three Australian states (Victoria, New South Wales and Queensland) have similar legislation requiring investigating officers to advise suspects who are foreign nationals of their right to consular communication before any questioning commences, to provide "reasonable facilities" to allow them to communicate with their consulate and to defer questioning for a reasonable period of time until that contact has taken

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[11] Few nations follow the American legal doctrine of treaty self-execution, requiring instead that a ratified treaty must be given domestic effect by separate executive or legislative implementation. See *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (general rule that a treaty "is carried into execution by the sovereign power of the respective parties" but that in the United States "a different principle is established" under the Supremacy Clause, whereby a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."); cf. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 per Mason CJ and Deane J ("It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute.)" One must therefore look to foreign judicial decisions enforcing the enabling statutes to discover the true scope of judicial remedies afforded for violations of Article 36 rights by other parties to the VCCR.

[12] Although the *Avena* judgment found that Article 36(1)(b) "cannot be interpreted to signify that the provision of such [consular rights] information must *necessarily* precede any interrogation," it is important to note that the treaty is required to be enforced through the laws of the receiving state, and those laws are required to give the treaty its full effect. *Avena* ¶ 87(emphasis added). This is precisely what Australia has done.

place.[13] These state and federal legislative provisions were enacted pursuant to Australia's view of its binding international legal obligations under article 36(1)(b).[14]

At common law in Australia, judges have the discretionary power to exclude unlawfully obtained evidence. *See Bunning v Cross* (1978) 141 CLR 54, 72 (per Stephen & Aickin JJ) (citing *R v Ireland* (1970) 126 CLR 321). Courts may exclude confessions in the exercise of either their "public policy" discretion[15] or a more general "unfairness" discretion.[16] The unfairness discretion focuses on the effect of the unlawful or improper conduct on the accused and is designed to protect his rights and privileges;

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[13] *See* CRIMES ACT 1958 (Vic), s.464F; LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 (NSW); POLICE POWERS AND RESPONSIBILITIES ACT 2000 (Qld), s.261.

[14] *See* LAW REVIEW COMMISSION OF NEW SOUTH WALES, REPORT 66 (1990) - CRIMINAL PROCEDURE: POLICE POWERS OF DETENTION AND INVESTIGATION AFTER ARREST, para. 5.43 and fn. 81, at http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R66CHP5 (citing para. 6.12 of the Gibbs Committee Review of Commonwealth Criminal Law of 1991); THE GILBERT AND TOBIN CENTRE OF PUBLIC LAW, *Submission made to Parliamentary Joint Committee on ASIO, ASIS and DSD on Questioning and Detention Powers* (March 24, 2005), p. 10, http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/subs/sub55.pdf.

[15] The public policy discretion involves weighing the interest in a conviction against "the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion." *Ireland*, 126 CLR at 335 (per Barwick, J.)

[16] *Cleland v. R* (1982) 151 CLR 1. The unfairness discretion has operated long before the public policy discretion. See *McDermott v. The King* (1948) 76 CLR 501, 512-3 (per Dixon J.). It operates where "by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been made suspect or for any other reason, that evidence should be excluded." *Duke v The Queen* (1989) 180 CLR 508 at 513 (per Brennan CJ).

the public policy discretion focuses on constraining law enforcement authorities so as to prevent them from engaging in illegal or improper conduct and is designed to further the public interest.[17]

In at least three cases, Australian courts have applied suppression or exclusion as the remedy for breaches of, *inter alia*, consular communication rights.[18] In these cases, the Australian courts have given careful consideration to the assistance consular officers can provide:

> Contacting the consular office by a detained foreign national provides an opportunity to report his or her circumstances, seek advice and assistance, provides a means of informing relatives and friends of his or her situation and all this in his or her native language. One need only contemplate the predicament of an Australian national held in custody in a foreign non-English speaking country without access to an Australian consular office to appreciate the importance of the right . . .

Tan Seng Kiah, [2002] NTCCA 1 at 49. The *Tan Seng Kiah* court also emphasized that timely access to consular assistance is an independent right, for which the provision of legal counsel or an interpreter is not a substitute:

> These rights are part of the statutory scheme introduced to provide protection to people detained by police. . .The right to consult a legal practitioner

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[17] *Foster v The Queen* (1993) 67 ALJR 550, 554; 113 ALR 1 at 6-7. The High Court has begun to synthesize these two related and overlapping discretions. *See R v Swaffield* (1998) 192 CLR 159, 194-5.

[18] *See R. v. Tan* [2001] WASC 275 (W. Austl. Sup. Ct.); *R v Su* [1997] 1 VR 1 (Sup. Ct. Vic.); *Tan Seng Kiah v R.*. [2000] 10 NTLR 128 (N. Terr. Ct. Crim. App.) (Austl.); *see also Foo v. The Queen* [2001] NTCCA 2 (N. Terr. Ct. Crim. App.) at 44.

> or to attempt to do so and the right to contact the consular office or to attempt to do so are rights independent of the right of access to an interpreter. They are rights available to be enjoyed "as soon as practicable".

Id. at 51. Finding that the defendant might have declined to give a statement if he had been permitted to exercise his rights under section 23P, the court suppressed his statement. *Id.* at 72.

2. Courts in the United Kingdom Have Granted Suppression to Remedy Consular Rights Violations

"The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries." *Roper v. Simmons*, 125 S.Ct. 1183, 1199 (2005). The rules governing apprehension, arrest, detention, questioning and other custodial issues in England and Wales are set down in the U.K. Police and Criminal Evidence Act of 1984 (PACE). The act is supplemented by the Codes of Practice, which give practical guidance in the treatment of suspects, prisoners and defendants.[19] As provided for in Code C, paragraph 7.1, detained foreign nationals must be informed "as soon as practicable" of their right to communicate with their consulate at any time, as well as their right to have their consulate notified of the detention. Under paragraph 7.3, consular officers "may visit one of their nationals in police detention to talk to them and, if required, to arrange for legal advice." Paragraph 7.5 requires that a record be made "when a detainee is informed of their rights under this section and of any communications" with an embassy or consulate.[20]

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[19] The Codes of Practice are available at: http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-codes.html.

The language and intent of these provisions is remarkably similar to U.S. regulations and operational policies governing the arrest or detention of foreign nationals by federal agencies. *See* 8 C.F.R. 236.1(e) (Department of Homeland Security); 28 C.F.R. 50.5(a) (Department of Justice); *see also* Internal Revenue Manual, part 9.4.12.9, (placing the onus on "the arresting agent" to "promptly inform" foreign detainees of their consular rights and "to ensure that notification is immediately given" to the nearest consulate). As in the federal regulations, the procedure to be followed under the PACE Code is explicit and mandatory. In both countries, the mandated procedures closely adhere to the plain language of Article 36.

Although the Code of Practice does not expressly require the suspension of an interrogation pending consular notification, courts in the United Kingdom have concluded that the failure to inform detained foreigners of their consular rights warranted the discretionary remedy of exclusion. Suppression of custodial statements has been ordered even where the foreign suspects were advised of and waived their right to counsel.[21] *R. v. Bassil and Mouffareg* (1990) 28

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[20] The explanatory n for this section declares: "The exercise of the rights in this section may not be interfered with" even in cases where a detainee may be otherwise held incommunicado, such as suspects detained under the *Terrorism Act 2000*.

[21] According to a State Department submission to the *Avena* Court, other parties to the VCCR have likewise adopted specific requirements to safeguard the individual rights enshrined under Article 36, such as Denmark's practice of informing the detained person of "his rights to remain silent and to contact his consulate; if the detainee at this point does not wish the interrogation to continue it will be stopped until consular notification is provided." *See* 2 Counter-Memorial of the United States of America (Mex. v. U.S.), Annex 4 at A384, note 7, (Nov. 3, 2003). In New Zealand, "law enforcement officials in practice stop interrogation if the individual asks for legal representation or to consult with the consulate." *Id.* In Brazil, "consular notification is considered one of the 'rights' under Article 5" of the Brazilian Constitution, which

July, Acton Crown Court, HHJ Sich (reported in *Legal Action* 23, December 1990); *R. v. Van Axel and Wezer* (1991) 31 May, Snaresbrook Crown Court, HHJ Sich (reported in *Legal Action* 12, September 1991).

Like their Australian counterparts, the British courts have recognized the unique significance of consular contact by ensuring that foreigners facing interrogation truly comprehend their legal rights and options. In its decision to exclude the custodial statements of two Lebanese defendants, the *Bassil and Mouffareg* court observed that a French or Arabic speaking consular official would have visited the defendants, assisted them in reaching an informed decision about their situation, and might well have advised them to obtain the assistance of counsel before making a statement.

Domestic courts holding that suppression is not an available remedy for an Article 36 violation because they found "no reason to think the drafters of the Vienna Convention had these uniquely American rights in mind" have missed an important point. *See, e.g., Lombera-Camorlinga, supra*, 206 F.3d at 886; *United States v. Page* 232 F.3d 536, 541 (6th Cir. 2000); *State v. Issa* (2001), 93 Ohio St. 3d 49, 56, fn. 2. There is nothing uniquely American about enforcing the rights to consular notification and access: as the practices of other VCCR parties indicate, access to timely consular notification is widely regarded as

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requires that an arrested person will be informed "of the right to remain silent and the right to have legal and familiar assistance." *Id.* at 381, n.2. Moreover, countries as diverse as Poland, Ireland, Indonesia have all enshrined the detainee's right to prompt consular information and notification in their national codes of criminal procedure. *See* Code of Criminal Procedure (Act of 6 June 1997), art. 612(2) (Poland); Criminal Justice Act, 1984 (Treatment Of Persons In Custody In Garda Síochána Stations) Regulations 1987, Reg. 14 (Ireland); Law of Criminal Procedure (KUHAP), art. 57 (2) (Indonesia).

an essential legal right. Indeed, nations that share our common law heritage have responded to violations of individual consular rights by applying judicial measures such as suppression. This Court has long recognized the relevance of that shared legal heritage in determining the necessary scope of individual rights and remedies. [22] "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Roper v. Simmons*, 125 S.Ct. 1183, 1200 (2005).

V. In Determining Whether Suppression is Appropriate, Courts Should Apply A Suitable Prejudice Standard

Although the court below did not directly address the question of remedies, it did cite with approval a sister court's decision holding that prejudice can never be demonstrated for an Article 36 violation where a foreign defendant has properly waived *Miranda* rights.[23] This presumption dangerously blurs the somewhat complementary yet fundamentally distinct nature of the two sets of rights at issue.

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[22] *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 488 n.59, 521-22 (1966) (comparing U.S. practice with that in India, Sri Lanka, and Scotland); *Rochin v. California*, 342 U.S. 165, 169 (1952) (Due Process Clause obliges courts to ascertain whether laws offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples"); *see also Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (finding that "the practices of other nations, particularly other democracies" could be "relevant to determining whether a practice [is] so implicit in the concept of ordered liberty that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well").

[23] *See State v. Martinez-Rodriguez*, 33 P.3d 267, 276 (N.M. 2001), *cert. denied*, 535 U.S. 937, 122 S.Ct. 1317, 152 L.Ed.2d 225 (2002).

The most appropriate standard of review in these circumstances is that cited by the State of Oregon in its pleadings before this Court;[24] namely, the three-prong prejudice test that has been cited with approval by state and federal courts around the country.[25] Under this analysis, the defendant has the burden of establishing prejudice by producing evidence that: (1) he did not know of his consular rights; (2) he would have availed himself of those rights if he had been so advised; and (3) there was a likelihood that the contact [with the consulate] would have resulted in assistance to him.[26] This test was recently cited and applied by the Oklahoma Court of Criminal Appeals in *Torres v. State*, 120 P.3d 1184, 1187 (Okla. Crim. App. 2005):

> It is often impossible to say whether a particular action in a criminal trial could affect the outcome. However, it is possible to show what particular assistance, if any, a government would offer its citizen defending against a crime in a foreign country. That is the right and privilege safeguarded by the Convention. This Court is unwilling to raise the bar beyond that which the Convention guarantees. If a defendant shows that he did not know he could have contacted his consulate, would have done so, and the consulate would have taken

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[24] *Sanchez-Llamas v. Oregon*, Respondent's Brief in Opposition, filed August 15, 2005, available at 2005 WL 2974438.

[25] *See, e.g., U.S. v. Esparza-Ponce*, 7 F.Supp.2d 1084, 1097 (S.D. Cal. 1998); *U.S. v. Raven*, 103 F.Supp.2d 38 (D.Mass. 2000); *U.S. v. Tapia-Mendoza*, 41 F. Supp. 2d 1250, 1254 (D. Utah 1999); *U.S. v. Briscoe*, 69 F.Supp.2d 738, 747 (D. Virgin Islands 1999); *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. App. 2002); *Zavala v. State*, 739 N.E.2d 135, 142 (Ind. App. 2000).

[26] *United States v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir.1989), *overruled on other grounds by United States v. Proa-Tovar*, 975 F.2d 592, 594-95 (9th Cir.1992) (en banc).

> specific actions to assist in his criminal case, he will have shown he was prejudiced by the violation of his Vienna Convention rights.

The Oklahoma court further noted that this prejudice test was consistent with the requirements of *Avena*:

> The phrase "actual prejudice" [in *Avena*] can refer only to prejudice flowing from the violation of the purpose of the Convention provision. That purpose is to ensure that a foreign citizen has the opportunity for aid from his or her government in an unfamiliar criminal jurisdiction. Whether or not the aid results in a different case outcome, a citizen must be actually prejudiced when he is denied aid his government would have provided.

Id. at 1188.

It would certainly be inappropriate to subsume the distinct right of consular notification into the question of whether a defendant has waived his rights under *Miranda*. Rights granted to an individual are distinct and waiver of one does not encompass a waiver of another. This is true even when the rights are closely related as are the Fifth Amendment rights to counsel and silence encompassed in the *Miranda* warnings itself. *See e.g. Connecticut v. Barrett*, 479 U.S. 523, 529-30 (1987) (defendant contemporaneously waived his right to silence and invoked right to counsel); *see also Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (specific invocation of right to counsel does not preclude subsequent voluntary waiver of right to remain silent); *and see Minnick v. Mississippi*, 423 U.S. 96, (1975) (invocation of right to remain silent does not invoke the right to counsel at all subsequent efforts at interrogation). Just as the waiver of one Fifth Amendment right under *Miranda* does not waive a distinct but related right, the waiver of a defendant's *Miranda* rights does not imply a waiver of his

rights to consular notification and access under an unrelated treaty.

CONCLUSION

Both domestic and international law require that an adequate remedy be provided to protect established rights. Suppression should be one of the remedies available to the lower courts in their assessment of Article 36 violations, and the judgment of the Oregon Supreme Court should be reversed.

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